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Five (5) Objectors were represented at the hearing: Ms. Eve Twohy, Mr. Martin B. Carey, Mr. Tom Carey, and the John Carey Ranch, Inc., all represented by Mr. William Leaphart, Helena, Montana; and the Montana Power Company, represented

by Mr. Ron Waterman, Helena, Montana. No exhibits were introduced on behalf of any of the Objectors.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Roger Noble, Hydrogeologist; Greg Van Voast, Water Rights Analyst; and Vicki Woodrow, Hearings Reporter. No exhibits were introduced on behalf of the Department; the Department was not represented by legal counsel.

#### MOTIONS

1. A motion to dismiss the Application was made by William Leaphart and joined by Ron Waterman on grounds that the Department had lost jurisdiction because the sixty (60) day time limit specified in Section 85-2-309, MCA, 1979, had been exceeded. The motion to dismiss was denied at the hearing.

2. Ron Waterman made a motion to consider the Application as a surface water application rather than a ground water application and that the burden be upon the Applicant to prove otherwise. This motion is addressed in Findings of Fact Numbers 5-8.

3. Ron Waterman made a motion that the Hearing Examiner take administrative notice of the technical reports and the Proposal for Decision from the hearing in the Matter of Application for Beneficial Water Use Permit No. 14965-g41E

and Application for Change of Appropriation Right No. 19230-c41E by Thomas H. Boone, Trustee. Administrative Notice was taken of the following reports: 1) Stream Depletion of the Boulder River by Tom Patton; 2) Investigation of Surface Water Resources in the Boulder River Downstream from Boulder, Montana, in Reference to Water Rights Applications, Boone, Thomas H., Jefferson County, 14965-g41E, 19228-c41E, 19229-c41E, and 19230-c41E, by Larry Brown; and 3) Watershed Plan and Environmental Impact Statement, Boulder River Watershed, Jefferson County, Montana, Prepared by the North Boulder Drainage District and the Jefferson Valley Conservation District. Notice was also taken of the Proposal for Decision prepared by Ronda L. Sandquist regarding the above-mentioned Boone Applications.

4. Mr. Leaphart and Mr. Waterman made a motion to dismiss the Application on grounds that the criteria required under Section 85-2-311, MCA, 1979 of the Montana Water Use Act were not met and therefore the application should be dismissed. That motion is hereby denied.

#### SUMMARY OF RECORD

1. On March 7, 1979, the Department received Application for Beneficial Water Use Permit No. 22048-g41E by Edward K. Kyler to appropriate 600 gallons per minute of water, not to exceed 145 acre-feet per annum from a well approximately 98 feet deep located in the SW1/4 SW1/4 SW1/4 of Section 1, Township 4 North, Range 3 West, M.P.M., in

Jefferson County, Montana. The water is to be diverted from April 15 to October 15, inclusive, of each year, and used for new sprinkler irrigation on a total of 300 acres, more or less, in the N1/2 of said Section 1.

2. On May 10, 17, and 24, 1979 the Department caused to be duly published in the Boulder Monitor, Boulder, Montana, Notice of Application for Beneficial Water Use Permit No. 22048-g41E.

3. On May 22, 1979, the Department received an objection to the above Application from the Montana Power Company.

4. On June 20, 1979, the Department received an objection to the above Application from Eve Twohy representing herself and the estate of William Twohy.

5. On June 27, 1979, the Department received an objection to the above Application from the Bureau of Reclamation. On July 3, 1980, the Department received a withdrawal of objection from the Water and Power Resources Service, formerly the Bureau of Reclamation.

6. On June 28, 1979, the Department received objections to the above Application from the John Carey Ranch, Inc., Martin B. Carey, Tom Carey, and the George Dawson Ranch.

## PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That the proposed well has been drilled and is located approximately 200 yards from the Boulder River (technical report by Roger Noble, 1980; Edward Kyler Testimony, TR. page 17).

2. That the well is approximately 98 feet deep and was test-pumped at a rate of 1000 gallons per minute; that the well is perforated from 44 to 96 feet; and that the well has a 6-inch casing (well log).

3. That the well is to be used for new sprinkler irrigation of approximately 70 acres (application).

4. That the water beneath the Boulder River is an aquifer system of essentially two (2) parts separated by clay layers (technical report by Roger Noble, 1980).

5. That "subsurface waters which contribute directly or indirectly to the surface flows are a part of the natural source of surface water." (Proposal for Decision In the Matter of the Boone Applications, p.77)

6. That "for groundwater to not be "a part of that surface water" there must exist a non-saturated intervening

layer between the surface water source and the point or withdrawal of the subsurface waters." (Proposal for Decision In the Matter of the Boone Applications, p. 77). The existence of clay layers in the formation log of this well indicate that there is not a continuous zone of saturation between the surface water, namely the Boulder River and the lower portion of the aquifer system beneath the Boulder River.

7. That the Applicant's well does not fully penetrate the entire aquifer, but rather is perforated below the clay layers in the aquifer system. Therefore, it is found that the Applicant intends to withdraw water from an aquifer which is not in a continuous zone of saturation with the Boulder River.

8. That the source of supply for this Application is groundwater.

9. That the Objectors, Eve Twohy, Martin Carey, John Carey Ranch, Inc., and Tom Carey, and the Montana Power Company, all possess prior downstream surface water rights that must be protected.

10. That the proposed use of water for sprinkler irrigation of crops is a beneficial use.

11. That there was no testimony regarding any planned uses or developments for which permits have been issued or

for which water has been reserved that would be interfered with by this Application.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part that "The department shall issue a permit if:

1. there are unappropriated waters in the source of supply:

a. at times when the water can be put to the use proposed by the applicant;

b. in the amount the applicant seeks to appropriate; and

c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;

2. the rights of a prior appropriator will not be adversely affected;

3. the proposed means of diversion or construction are adequate;

4. the proposed use of water is a beneficial use;

5. the proposed use will not interfere unreasonably with other planned uses or developments for which a

permit has been issued or for which water has been reserved; . . ."

2. It is concluded that the source of supply is groundwater and there are unappropriated waters in the source of supply at times when the water can be put to use proposed by the Applicant, in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

3. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit.

4. It is concluded that the proposed means of diversion or construction are adequate.

5. It is concluded that the proposed use of water is a beneficial use.

6. It is concluded that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for nor does anything decided herein have bearing on the status of claimed rights of any other party except in



relation to those herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions and limitations listed below, Application for Beneficial Water Use Permit No. 22048-g41E by Edward K. Kyler is hereby granted to appropriate 600 gallons per minute not to exceed 145 acre-feet per annum of groundwater from a well located in the SW1/4 SW1/4 SW1/4 of Section 1, Township 4 North, Range 3 West, M.P.M., in Jefferson County, Montana. The water is to be diverted from April 15 to October 15, inclusive, of each year for new sprinkler irrigation on a total of 70 acres, more or less, in the SW1/2 of Section 1, Township 4 North, Range 3 West, M.P.M., Jefferson County, Montana.

2. Provisional Permit No. 220487-g41E is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a

written record of the flow rate and volume of all the waters diverted including the period of time and shall submit said records to the Department upon request.

4. The well shall be so constructed that water is not wasted or allowed to contaminate other water supplies or sources.

5. The final completion of the well shall include an access port of at least 0.50 inch diameter, located so that the static water level in the well can be adequately measured.

6. The issuance of the Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

#### NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 14<sup>th</sup> day of November, 1980.

David L. Pengelly  
DAVID L. PENGELLY, U.N.R. & C.  
HEARING EXAMINER